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No. 07-10

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In The
Supreme Court of the United States

DANIEL MONTES, JR.,

Petitioner,

v.

JEFFEREY P. RANSOM, #6952; DEMARQUIS F. BLACK, #7574; WILLIE FAYE WASHINGTON; and DAVID BONNER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S QUESTION PRESENTED FOR REVIEW

The Question Presented by Petitioner does not accurately reflect the issue in this case. Specifically, Petitioner overstates the issue in hopes of creating some reason for this Court to grant review. All Respondents were entitled to summary judgment on Petitioner's tight-handcuffing excessive force claim for various reasons, including Petitioner's failure to present competent, admissible summary judgment evidence that he had suffered an injury.

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1. The district court held that allegations of injury from allegedly "over-tight handcuffing" are insufficient to support an excessive force claim if they are not corroborated by medical or other objective evidence. Pet. App. at 6a-7a, Slip op. at 8-9. The court concluded that Montes had come forward with no admissible, competent summary judgment evidence of an injury to support an excessive force claim, and no summary judgment evidence of any affirmative personal participation or deliberate indifference by the County Jail Supervisors to support his claim that they unnecessarily protracted the time he remained handcuffed. *Id.* at 7a-10a, Slip op. at 8-11.

2. The Fifth Circuit held that handcuffing too tightly, without more, does not amount to excessive force. *Id.* at 13a, Slip op. at 1. The court also upheld the district court's ruling that unauthenticated documents are not sufficient to establish injury from an alleged use of excessive force. *Id.* at 14a, Slip op. at 2. The court also concluded that there was no error in the district court's ruling that the County Jail Supervisors were not liable when there was no underlying constitutional violation, that is, no underlying claim for excessive force by a subordinate County Jail employee for whom the Supervisors were responsible. *Id.*, Slip op. at 3.

JURISDICTION

The district court had jurisdiction over this civil action pursuant to 28 U.S.C. §§ 1331 and 1343. The Circuit Court had jurisdiction over this action pursuant to 28 U.S.C. § 1291. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Factual Background

On November 9, 2002, Dallas police officers, including Jefferey P. Ransom and Demarquis F. Black, responded to a call for police assistance at a residence in Dallas. When Ransom and Black arrived, they saw Daniel Montes, Jr. moving items out of the house into the yard. Annie Laura Scott, the owner of the property, reported that Montes had broken into the house, claiming it was legally his, and had changed the locks on the door.

In their efforts to make sense of this unusual situation, Ransom and Black consulted with and relied on determinations by several persons, including the Chief Constable of Dallas County, a justice of the peace, and a Dallas police sergeant, who were more familiar than they were with the laws and procedures governing evictions. It was determined that Montes's efforts to oust Ms. Scott were clearly illegal, and various persons tried to persuade Montes to relent. When it became clear that Montes would not stop his illegal eviction, Ms. Scott was asked if

she wanted to press charges against him for criminal trespass. When she said she did, Ransom arrested and handcuffed Montes. Once he was under arrest, Montes began telling everyone he was going to sue them. Montes tried to bargain with Black by saying things like, "If you let me go right now, I won't include you in my lawsuit." Black drove Montes to the Dallas County Jail, where he transferred custody of Montes to Dallas County jailers.

II. Proceedings in the District Court

Montes, proceeding pro se as he has throughout this litigation, filed suit against Ransom and Black ("the City Police Officers") and Dallas County Sheriff's Officers Willie Faye Washington and David Bonner ("the County Jail Supervisors"). (Docket entry 1.) Answers were filed on behalf of the City Police Officers (docket entry 7) and on behalf of the County Jail Supervisors (docket entry 15). Both the City Police Officers and the County Jail Supervisors asserted qualified immunity as a defense to all federal claims. (Docket entries 7 and 15.)

Montes filed an amended complaint, with leave of the district court. (Docket entries 22 and 23.) All the defendants asserted qualified immunity in the answers filed in response to that amended complaint. (Docket entries 32 and 33.) In his amended complaint, Montes brought claims under 42 U.S.C. §§ 1981, 1983, and 1985, as well as claims under federal criminal law, 18 U.S.C. §§ 241 and 242. Montes asserted

claims for use of excessive force, a violation of equal protection rights, and conspiracy to violate civil and equal protection rights, and he premised those claims on alleged violations of the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. Pet. App. at 3a, Slip op. at 3. Montes also asserted pendent state-law claims for negligence, assault and battery, and intentional infliction of emotional distress.

The City Police Officers filed a motion for summary judgment, as did the County Jail Supervisors. (Docket entries 39, 43.) All the defendants asserted the defense of qualified immunity in their motions for summary judgment. Montes filed a response and an appendix containing, among other things, his own affidavits and an affidavit of his mother, Elizabeth Hernandez Hudson; discovery responses by the City Police Officers; photographs allegedly showing his injuries from the incident; and unauthenticated medical injury reports and medical bills. (Docket entries 50, 51.)

The district court granted both motions for summary judgment and rendered judgment that Montes take nothing by his federal claims and dismissed without prejudice his pendent state-law claims. (Docket entries 101-102.) In its memorandum opinion, the district court held that allegations of injury from over-tight handcuffing are insufficient to support an excessive force claim if they are not corroborated by medical or other objective evidence. *Id.* at 7a-8a, Slip op. at 8-9 (citing *Tarver v. City of Edna*, 410 F.3d 745, 752 (5th Cir. 2005); *Crumley v. City of*

St. Paul, 324 F.3d 1003, 1008 (8th Cir. 2003); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001); *Foster v. Metro. Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990)). The court also held that maliciously applying handcuffs too tightly, refusing to loosen them, and tightening them further in response to a complaint that the handcuffs are too tight constitute conduct that may be reprehensible but that is not repugnant to the "conscience of mankind." *Id.* at 8a, Slip op. at 9 (citing *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997)).

The court concluded that Montes had come forward with no summary judgment evidence of any affirmative personal participation or deliberate indifference by County Jail Supervisors to support his claim that they unnecessarily protracted the time he remained handcuffed. *Id.* at 9a-10a, Slip op. at 11.

The court held the 42 U.S.C. § 1985(2) claim that the City Police Officers retaliated against Montes by tightening his handcuffs because he threatened to sue them was frivolous. The court further concluded Montes offered nothing but conclusory allegations to support his conspiracy claim under 42 U.S.C. § 1985(3) and failed to adduce any evidence that Defendants treated him differently than others similarly situated or purposefully discriminated against him. *Id.* at 10a-12a, Slip op. at 12-13. Finally, the court dismissed Montes's supplemental state law claims pursuant to 28 U.S.C. § 1367(c)(3). *Id.* at 12a, Slip op. at 13. Finding no constitutional violation by any of the defendants, the district court did not address the question of the defendants' right to

qualified immunity had there been any evidence of any such violation.

III. Proceedings in the Fifth Circuit Court of Appeals

In the Fifth Circuit, Montes asserted three issues: (1) whether the district court abused its discretion in dismissing his excessive force claims against all the defendants; (2) whether the district court abused its discretion in not allowing him to add additional defendants; and (3) whether the district court abused its discretion in not granting his motion for recusal. A panel of the Fifth Circuit affirmed the district court's judgment in an unpublished per curiam decision. Pet. App. at 7a-16a.

As to the excessive force issue, the Fifth Circuit held that handcuffing too tightly, without more, does not amount to excessive force. *Id.* at 13a, Slip op. at 1 (citing *Tarver v. City of Edna*, 410 F.3d 745, 752 (5th Cir. 2005); *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2005)). The court also upheld the district court's ruling that unauthenticated documents are not sufficient to establish injury from an alleged use of excessive force. *Id.* at 14a, Slip op. at 2 (citing *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994); *Haynes v. Pennzoil Co.*, 141 F.3d 1163 (5th Cir. 1998)). Next, the Fifth Circuit concluded that there was no error in the finding that the County Jail Supervisors were not liable when there was no underlying constitutional violation, that is, no underlying claim for excessive force by a subordinate County Jail employee for

whom the Supervisors were responsible. *Id.*, Slip op. at 3. The Fifth Circuit further held that Montes's equal protection claim could not withstand summary judgment scrutiny because it was based on only conclusional allegations that all four defendants are black, Montes is Hispanic, and an unnamed black judge with whom Montes had previously had difficulty was involved in his arrest. *Id.* at 14a-15a, Slip op. at 3.

As to the conspiracy claims asserted under Section 1985, the court upheld the finding that conclusional allegations are insufficient to defeat a summary judgment motion, as well as that Montes had abandoned his claims under Sections 1985(2) and (3). *Id.* at 15a, Slip op. at 3-4. The court rejected Montes's argument that the district court abused its discretion in not allowing Montes to add additional defendants, and also rejected his recusal argument, because both issues were raised for the first time on appeal. *Id.* at 15a-16a, Slip op. at 5-6.

SUMMARY OF THE ARGUMENT

This Court should deny Montes's petition for a writ of certiorari. The Fifth Circuit properly held that handcuffing too tightly, without more, does not amount to excessive force, and that admissible medical evidence establishing some injury is required to satisfy the injury requirement of a tight-handcuffing excessive force claim. The photographs Montes offered showed at most only inherently transient, minor red marks and perhaps a small amount of swelling, Resp. App. at 1 (from R. [separate folder]:32), and his

unauthenticated medical records were not competent summary judgment evidence of injury. The Fifth Circuit also correctly held that the County Jail Supervisors could not be liable in a supervisory capacity where, as here, there was no underlying constitutional violation.

In addition, Montes has neither demonstrated a split in the circuits nor has he demonstrated that the Fifth Circuit has articulated and applied an improper standard in Fourth Amendment excessive force cases involving over-tight handcuffing. Montes's petition simply does not set forth sufficient grounds or compelling reasons to grant a writ of certiorari. If accepted for review, the case would involve matters applicable and relevant only to the parties in this case. Accordingly, Montes's petition should be denied.

REASONS FOR DENYING THE PETITION

I. Montes Has Failed to Establish Sufficient Grounds for Certiorari under the Supreme Court's Rules.

Montes's petition for a writ of certiorari should be denied because Montes has not asserted sufficient grounds to justify review by this Court. Supreme Court Rule 10 states that this Court will grant a writ of certiorari "only for compelling reasons." Montes argues that there is a circuit split about whether more than a *de minimis* injury is required to sustain a tight-handcuffing excessive force claim, but given

that he failed to present competent evidence of *any* injury suffered as a result of the alleged too-tight handcuffing, this case is not an appropriate vehicle for consideration of that issue.

Montes also argues that the Fifth Circuit's decision conflicts with this Court's decisions in *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Graham v. Connor*, 490 U.S. 386 (1989), but the legal basis for this argument is not at all clear from Montes's petition. *Hope*, 536 U.S. at 733-35, involved an Eighth Amendment excessive force claim brought by a convicted prisoner. This Court clarified in *Graham*, 490 U.S. at 394, that such a claim should be analyzed under a different standard than a claim relating to an arrest or investigatory stop of a free citizen such as Montes. In *Graham*, *id.* at 395, this Court held that all claims of excessive force in the course of a "seizure" of a free citizen should be analyzed under the standard of Fourth Amendment objective reasonableness rather than substantive due process. This Court directed that the reasonableness of a particular use of force must be considered "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396 (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)). And this Court noted that "[w]ith respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." *Id.* (citation omitted) (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d

Cir. 1973)). There is no conflict between the Fifth Circuit's decision in this case and the principles articulated in *Graham*.

This case presents none of the bases for review suggested in Rule 10, nor does it present any other compelling reason to grant review. The Court should "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

II. The Fifth Circuit Correctly Held that Handcuffing Too Tightly, Without More, Does Not Amount to Excessive Force.

The Fifth Circuit correctly held that handcuffing too tightly, without more, does not amount to excessive force, and that admissible medical evidence establishing some injury is required to satisfy the injury requirement of a tight-handcuffing excessive force claim. Pet. App. at 14a, Slip op. at 2. Photographs that Montes had taken of his wrists after he was released from the Dallas County jail, *see* Resp. App. at 1, did not show he had sustained more than minor red marks and maybe some swelling on his wrists. The district court correctly concluded that those manifestations are "inherently transient." Pet. App.

at 6a, Slip op. at 7. The district court also correctly noted that Montes's proffered videotape apparently showing him being processed at the Dallas County jail (R. [separate folder]:135) does not show he was suffering any discomfort from the handcuffs. *Id.* at 7a, Slip op. at 9 n.5. Montes opined in an affidavit that since the arrest (1) he suffers constant pain in his left arm and suffers both constant pain and lost feeling in both hands, (2) he has lost 25 percent gripping strength in both hands, (3) he has been unable to find work as a construction worker because of his inability to lift heavy objects, (4) he continues to take pain medication for the incessant pain in his hands, wrists and arms, and (5) he "predicts to continue to visit nerve specialists for the rest of his life considering the injuries seem to be permanent." (R. [separate folder]:12-13, 15.) The district court correctly disregarded these opinions because Montes is not a medical expert and he proffered no expert testimony to show any permanent injury. Pet. App. at 6a, Slip op. at 7; *see* Fed. R. Evid. 702. Montes also presented what appear to be medical bills and records, which the district court correctly refused to recognize because they were unauthenticated hearsay. *Id.* at 6a-7a, Slip op. at 8. The Fifth Circuit concluded that Montes had established no error in the district court's evidentiary ruling and held that unauthenticated documents are not competent summary judgment evidence. *Id.* at 14a, Slip op. at 2. That conclusion was correct and does not present an issue for review.

III. This Case Does Not Involve a Split of Authority Among the Circuits.

The Fifth Circuit's decision is consistent with other circuit court holdings that allegations of injury from over-tight handcuffing are insufficient to support an excessive force claim if they are not corroborated by medical or other objective evidence. *Id.* at 7a-8a, Slip op. at 8-9 (citing *Crumley v. City of St. Paul*, 324 F.3d 1003, 1008 (8th Cir. 2003); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001); *Foster v. Metro. Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990)). In *Crumley v. City of St. Paul*, 324 F.3d at 1008, the plaintiff alleged that her handcuffs were secured so tightly they made one of her hands bleed. Nonetheless, the Eighth Circuit reaffirmed, *id.*, its holding in *Foster v. Metropolitan Airports Commission*, 914 F.2d 1076, 1082 (8th Cir. 1990) (involving a claim of nerve damage to the arms), that a claim of injury from being handcuffed is insufficient to support an excessive force claim in the absence of medical evidence of a "long-term injury" resulting from the handcuffing. In *Arpin v. Santa Clara Valley Transportation Agency*, 261 F.3d 912, the Ninth Circuit affirmed summary judgment on a Fourth Amendment excessive force claim where the plaintiff failed to provide medical records showing she suffered an injury from being handcuffed, *id.* at 921, even though during the handcuffing her left arm was allegedly twisted "with enough force to lift her off the ground and break her watch band," *id.* at 918.

IV. The Fifth Circuit's Judgment Was Correct Because all the Defendants Were Entitled to Judgment as a Matter of Law.

Even if Montes had established an injury by admissible, competent summary judgment evidence, all the defendants still were entitled to judgment as a matter of law. The City Police Officers established by uncontroverted summary judgment evidence that their conduct was objectively reasonable even if Montes suffered an injury. The County Jail Supervisors were entitled to judgment as a matter of law because Montes failed to present any evidence that they were directly involved in any way with Montes's handcuffing or that they unnecessarily protracted the time he remained in handcuffs at the jail and because Montes likewise failed to establish conduct by the Supervisors that would overcome their right to qualified immunity.

A. The City Police Officers Were Entitled to Summary Judgment on Alternative Grounds.

The City Police Officers were entitled to summary judgment on alternative qualified immunity grounds presented in their motion, but not reached by the district court or the Fifth Circuit. Qualified immunity's first reasonableness inquiry should be resolved in favor of the City Police Officers if they could have made a reasonable mistake of fact. *Saucier v. Katz*, 533 U.S. 194, 205 (2001). Assuming for

summary judgment purposes that Montes suffered an injury as a result of being handcuffed too tightly, the City Police Officers are entitled to qualified immunity because they did not see any injuries on his wrists (R. 2:239, 243) and so could have reasonably, albeit mistakenly, believed Montes was not injured. While Montes's wrists could have become swollen at some point after he was handcuffed (which the City Police Officers deny), there was no evidence that they were swollen, or that Ransom or Black observed them to be swollen, while Montes was in the City Police Officers' custody.

A reasonable police officer could easily accidentally handcuff a person too tightly. A reasonable police officer could also fail to adjust handcuffs if the officer mistakenly believes the handcuffs are not too tight. A reasonable police officer could even mistakenly determine that handcuffs need to be tightened further, even when they are already tight enough. And a reasonable police officer need not credit an arrestee's inevitable complaint that his handcuffs are too tight, in the absence of visible signs or other corroborating evidence of injury. *See Rodriguez v. Farrell*, 294 F.3d 1276, 1278 (11th Cir. 2002) (opinion on denial of reh'g) (noting, in a handcuffing excessive force case, that "a police officer need not credit everything a suspect tells him," especially "when the officer is in the process of handcuffing a suspect"). From the perspective of a reasonable officer, it would not have

been unusual for Montes to request that his handcuffs be adjusted or loosened. Handcuffs, by their very nature, are restrictive, uncomfortable, and unfamiliar to most individuals. And a criminal suspect has obvious motives behind a complaint of overtight handcuffs: loose handcuffs provide an avenue for escape, which will create a volatile situation that may seriously threaten the safety of the arresting officer and others. It is obvious that a prudent arresting officer will be wary of the obvious dangers of loosening handcuffs merely because an arrestee complains of discomfort or pain.

That the City Police Officers did not see any injury to Montes's wrists is especially significant to Montes's alleged nerve injury. Regardless of whether Montes complained that his handcuffs were too tight, a reasonable police officer in the City Police Officers' place could have easily believed that the absence of red marks, abrasions, swelling, or any other physical manifestation of injury to Montes's wrists indicated that no injury was in fact occurring. (*See* R. 2:239 (Black did not see any injuries), 243 (Ransom did not see any injuries); R. [separate folder]:32 (Montes's proffered photographs).) In the highly unlikely event that Montes received a nerve injury from handcuffs that were not tight-enough to leave a noticeable mark on his wrists, then the uncontroverted summary-judgment record established that the City Police Officers were reasonably mistaken about the facts governing the situation they confronted.

B. The County Jail Supervisors Were Entitled to Summary Judgment on Alternative Grounds.

The district court concluded that there was no basis for liability against the County Jail Supervisors because there was no underlying constitutional violation. Pet. App. at 4a-9a, Slip op. at 5-11. Even if the district court had concluded otherwise, the Supervisors were still entitled to summary judgment. They were entitled to summary judgment because, as the district court also correctly concluded, there was an absence of evidence in the record that either of the Supervisors personally participated in or were even aware that Montes was being held in the jail, let alone held in "over-tight" handcuffs. *Id.* at 9a-10a, Slip op. at 10-11. Montes's admission in the district court that he held the Supervisors liable solely because they were supervisors precluded the imposition of Section 1983 liability against either of them.

There is no split between the circuits or conflict with this Court on the legal principle that individuals may be held liable under Section 1983 based only on their own conduct. *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2006); *Patterson v. County of Oneida*, 375 F.3d 206, 229 (2d Cir. 2004); *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003); *Camilo-Robles v. Hoyos*, 151 F.3d 1, 7 (1st Cir. 1998); *Montgomery v. DeSimone*, 159 F.3d 120,

126-127 (3d Cir. 1998); *Otey v. Marshall*, 121 F.3d 1150, 1155 (8th Cir. 1997); *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989).

And, as with the City Police Officers, even if there had been evidence of some involvement by the Supervisors in the handcuffing and continued handcuffing of Montes, the Supervisors would still have been entitled to the defense of qualified immunity, not only from liability but from suit. As this Court has held, unless the Supervisors engaged in conduct that any court could characterize, as a matter of law, as plainly incompetent or done in knowing violation of the Constitution, they are entitled to qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Given the absence of any such evidence in this record, the Supervisors would still be entitled to a judgment in their favor even if this Court granted review and, upon hearing, agreed with the arguments made in Montes's petition.

CONCLUSION

Montes's claims against all the defendants have been fully examined and dismissed. Montes has failed to articulate any reason why this Court should grant his petition for a writ of certiorari. The City Police Officers and the County Jail Supervisors respectfully

request, therefore, that this Court deny Montes's petition.

Respectfully submitted,

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